REPORT OF EVALUATION COMMITTEE

Submitted to Court Meeting, March 22, 2000

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The Evaluation Committee was established March 1, 1999. The members of the Committee are:

Senior Circuit Judge David R. Thompson, Chair
Circuit Judge Mary Schroeder
Senior Circuit Judge Edward Leavy
Circuit Judge Thomas G. Nelson
Circuit Judge Michael Daly Hawkins
Circuit Judge M. Margaret McKeown
Circuit Judge Kim McLane Wardlaw
Chief District Judge David Ezra
Professor Arthur Hellman
Miriam Krinsky *(*Chair, Advisory Rules Committee*)*

During the twelve-month period the Committee has been in existence, it has met regularly to investigate and study concerns and issues pertaining to the court, the court's constituency, and the geographical area it serves. The Committee has enlisted assistance from academic experts and has reviewed research work by the court's staff attorneys. In conjunction with the Circuit's Advisory Rules Committee, the Evaluation Committee has conducted bench-bar focus group meetings at a variety of locations in the circuit to obtain the views and suggestions of the Ninth Circuit bench and bar. The Committee has also widely circulated a

detailed call for comments from judges, lawyers, and other interested parties from across the circuit and across the nation.

The mission of the Committee is:

> *To examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendation to its judges to improve the delivery of justice in the region it serves.*

Pursuant to its mission, the Committee initially identified approximately 35 matters for consideration. Thereafter, new topics were added and some were deleted. Eventually, the work of the Committee became focused in five categories: The En Banc Process, Improved Processes and Efficiencies, Consistency of Decisions, Collegiality, and Regional Sensitivity and Outreach.

THE EN BANC PROCESS

In reviewing the court's en banc process, the Committee considered whether more judges should be included on the en banc court; whether the number of votes required to take a case en banc should be decreased in order to increase the number of cases taken en banc; whether the composition and method of selection of the en banc court should be altered; and whether other modifications should be made to the court's en banc procedures.

In the course of its work, members of the Evaluation Committee consulted with a number of outside academic experts. One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University, who

conducted a statistical analysis of the size of the limited en banc court in relation to a full court of 28 judges. His analysis demonstrated that an en banc court of 11 judges is sufficient to achieve approximately 94% representativeness, and increasing the number of judges on the en banc court from 11 to 13 or 15 would add very little to that degree of reliability.

Members of the Evaluation Committee also spent a day with a panel of distinguished scholars drawn from a variety of disciplines that bear on the operation of appellate courts. They were: Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford, CA; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, CA. Prior to the meeting, these academics had been provided with materials including the White Commission Report, along with the rules, procedures and statistics relating to the Ninth Circuit en banc court. Among other things, this group confirmed the import of the calculations done by Professor Kaye in concluding that the current random draw is effective in providing a representative en banc court. The group strongly recommended, however, that to increase the level of representation of judges in the *overall* en banc process, the court should consider ways to increase the number of cases taken en banc.

In addition to considering the views of academic experts, the Committee collected data on how close the votes had been to take cases en banc since the limited en banc court was instituted in 1980, how frequently cases that were taken

en banc involved panel decisions with dissents or concurrences, how often a visiting judge was on the three-judge panel, and whether cases taken en banc had received Supreme Court review. In the course of its research, the Committee determined that since 1980, when Congress authorized the limited en banc process, more than 170 limited en banc decisions had been rendered. One-third of those decisions were by a unanimous en banc court and three-quarters were rendered by a majority of 8 to 3 or greater.

Having considered all of the foregoing, the Evaluation Committee presented three suggestions to the court for increasing the number of judges on the en banc court. A majority of the Committee recommended that the en banc court consist of 13 judges if the number of active judges was 25 or more, and otherwise the en banc court should consist of 11 judges. Some members of the Evaluation Committee believed that the court should increase the number of judges on the en banc court to 13 regardless of the number of vacancies on the court, and thereafter increase the number to a majority of the court's active judges. The third view was that the court should simply increase the en banc court to 15 judges. The Committee also recommended that the number of affirmative votes required to take a case en banc be decreased.

These recommendations were presented to the court at the court meeting on July 27, 1999. By the time of that meeting, Senator Feinstein had introduced Senate Bill 1043 entitled "The Ninth Circuit En Banc Procedures Act." The bill provided for a reduction in the number of votes required to take a case en banc from a majority to 40%, and an increase in the size of the en banc court to a majority of the

active judges. The bill also contained a provision requiring judges from specified geographic areas of the circuit to be on three-judge panels hearing cases in those areas. The court voted, 15 to 8, to endorse the Feinstein bill.

Although the court has not yet decreased the number of votes required to take a case en banc, the number of cases taken en banc has increased significantly in the past three years, as shown in the following table:

Calendar Year	No. of Cases Taken En Banc
1994	8
1995	8
1996	14
1997	19
1998	17
1999	20
2000 (to March 10)	5

As can be seen, the high figure for 1999 is no "spike;" it reflects an apparent change in the court's en banc culture. This suggests that the concern about not taking enough cases en banc is being met within the framework of the court's existing rules and procedures.

To conduct en banc hearings in what may prove to be a more efficient use of judge time, and to reduce travel requirements, the court has adopted, on an experimental basis, the suggestion of the Committee to hold en banc hearings quarterly throughout the year. The experiment is still in its early stages; this month

the court holds its first set of quarterly hearings. The Committee believes that after further experience with quarterly hearings the court will be in a good position to determine whether this form of scheduling should be continued, modified, or abandoned.

Finally, mention should be made of one Committee recommendation that has already been implemented. As suggested by the Committee, the court's Web site now contains a status report on all cases in which en banc review has been granted. The report presents key information about the cases, including a summary of the issues before the en banc court. Through this Web site, trial judges and lawyers can now ascertain whether a pending en banc decision may affect their own cases and the status of the pending en banc rehearing.

IMPROVING PROCESSES AND EFFICIENCIES

As part of its work, and particularly as a result of the many bench-bar meetings held around the circuit, the Committee received a number of suggestions for improving court processes. The Committee recommended some of these to the court. The court rejected some recommendations, adopted some, and sent the Committee back to the drawing board with regard to others. The following are some of the proposals that remain under consideration or are ready for consideration by the court at this time:

! ***"Citeability" Rule*** - The Advisory Rules Committee has recommended to the court that an experiment to allow citation of unpublished dispositions for

persuasive value be permitted to proceed. This recommendation will be considered by the court as a separate agenda item at the March 22 meeting.

! ***Lead Cases and Batching Cases on Argument Calendars*** - In preparing the court's calendars, staff has been directed to batch a number of cases raising the same issue and to inform the panel assigned to adjudicate a collection of batched cases that other cases may be awaiting resolution of a lead case or cases. These procedures will permit the panel to designate which case or cases should serve as "lead," and to make sure the key issue gets resolved as expeditiously as possible.

! ***Identity of Motions Panels*** - The Evaluation Committee recommends to the court that the identity of the motions panels be released on the first day of each month. Under existing practice, institutional parties - by virtue of their voluminous caseload - become aware of the panel identity early in the month, but most other lawyers and pro se litigants have no knowledge of the motions panel composition. To address the perception (and perhaps to some degree the reality) that institutional parties have an advantage in determining when to file their motions, the court should consider releasing the names of the motions panels on the first day of the month.

! ***Resolution of Pending Motions*** - The bar has expressed concern that not infrequently pending procedural motions that were referred to the merits panel are not dealt with prior to argument, thus causing confusion or uncertainty for counsel as to how to proceed on certain matters. The Committee recommends that presiding judges take steps to try and resolve these motions prior to argument.

! ***Resolution of Dispositive Motions*** - The bar had expressed concern that many dispositive motions were being referred by motions panels to merits panels, thus

requiring full briefing and attendant delay, only to have the merits panel decide the case on the issue previously raised in the dispositive motion. There appears to have been some improvement in this regard recently, but the Committee plans to continue to monitor the situation.

! ***"Focus" Orders*** - To the extent panels and en banc courts are able to do so, the Committee encourages issuance of orders prior to oral argument directing counsel to focus on particular issues or cases.

! ***Issues not addressed in briefing or argument*** - A concern arose during bench-bar gatherings regarding the resolution of appeals based on either an issue or recent authority not briefed or addressed by the parties. To alleviate any such problem, the Evaluation Committee would like to remind the court of General Order 4.2:

> If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon the particular point.

! ***"Lost" or "Stalled" Cases*** - The Advisory Rules Committee is considering an Advisory Committee note to give counsel guidance as to what to do when their case appears to have been either lost or stalled.

CONSISTENCY OF DECISIONS

While there is no objective evidence that Ninth Circuit decisions are subject to greater inconsistency than those in other circuits, there is a perception that a

circuit as large as the Ninth cannot avoid inconsistencies with so many panels issuing so many opinions. Responding to this perception, the Committee has focused its efforts on strengthening the court's ability to recognize potential or perceived conflicts early and address them directly and immediately.

Before cases are assigned to three-judge panels, the Case Management Attorneys in the Office of Staff Attorneys prepare inventory cards for all cases sent to oral argument panels. This information includes a notation of all pending cases that raise a related issue, as well as recent panel decisions that may have been issued since the briefs were filed. The inventory cards also include a notation of recent Supreme Court decisions and specify the issues upon which the Supreme Court has granted certiorari. A new computer data base has been created to capture all of this information.

The Case Management Attorneys also issue daily pre-publication reports. These reports briefly summarize the decisions of three-judge panels in every opinion that is about to be filed, and identify pending cases before the court that may be affected by the opinions. The report is circulated two days before an opinion is published. This enables the entire court to review upcoming opinions for consistency without delaying the disposition of appeals, and informs panels which may have heard argument (or are about to hear argument) that a case raising related issues has just been decided.

The Committee is also addressing the perception expressed in the White Commission Report, and by some district judges and practitioners within the Ninth Circuit, that conflicts exist between unpublished memorandum dispositions and

between unpublished memorandum dispositions and published opinions. The Commission acknowledged it had no hard data to support this perception, and expressed the view that "neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis." Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report, p.40. The Commission frankly stated that "In the time allotted, we could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make our own, objective determination of how the Ninth Circuit Court of Appeals measures up to others." Id. at 39.

In contrast to the White Commission, the Committee believes that it is possible to obtain evidence that will shed additional light on the Ninth Circuit's performance in maintaining intracircuit consistency. To that end, the Committee has sought information from those who are in the best position to know if conflicts exist – the members of the Ninth Circuit legal community. The Committee has circulated a memorandum to Ninth Circuit Lawyer Representatives, Senior Advisory Board Members, all law school deans within the Ninth Circuit and to other members of the academic community asking for their help in identifying what may appear to be conflicting decisions. In addition, the Committee has circulated to all Ninth Circuit district judges, magistrate judges and bankruptcy judges a request to bring to the court's attention examples of possible conflicts involving unpublished memorandum dispositions. A response form has been established to permit responses to be sent to the court on the court's Web site. The

form may also be faxed or mailed to the court. The form was initially made available to the public in late January. To date, only a handful of responses have been received.

Since August 1999, the Committee has also been monitoring published opinions for consistency. Pursuant to this Opinion Monitoring Experiment, Case Management Attorneys monitor published opinions falling within six categories:

> (a) the opinion expressly distinguishes one or more Ninth Circuit precedents; (b) the opinion expressly rejects out-of-circuit precedents; (c) the opinion includes a dissent; (d) the opinion holds a federal statute unconstitutional; (e) the opinion holds a state statute or initiative unconstitutional; (f) the opinion invalidates a published federal regulation.

If a petition for rehearing is filed in any of these "flagged" cases, the Case Management Attorneys notify one of the circuit judges on the Evaluation Committee. That judge then reviews the opinion and the petition for rehearing to determine whether there is an asserted conflict and, if so, whether that assertion appears to have merit. The staff and the reviewing circuit judge also monitor comments by judges pertaining to the opinion, as well as requests for General Order 5.4(b) notices, stop clocks, and calls for en banc. During the six-month period since the experiment began, the court has issued 79 opinions falling within the six flagged categories (out of a total of 490 opinions filed). The parties have filed petitions for rehearing en banc in 40 of these flagged cases. In 30 of them, the court has taken action in the form of requesting notification prior to the issuance of the mandate,

requesting a General Order 5.4(b) notice, stopping the clock, or calling for en banc rehearing.

To this point, the data suggests that the court is properly monitoring its opinions for consistency and resolving potential conflicts. The court has taken action in a relatively high percentage of the "flagged" cases in which petitions for rehearing have been filed, and has focused on those cases in which the assertion of a conflict seems to have some merit.

The Committee is not yet in a position to draw conclusions, even tentatively, about monitoring vis-à-vis the Supreme Court. That element, although not directly related to intracircuit consistency, is a matter worthy of further study and analysis. Certiorari petitions from cases decided by panels since the experiment began have now started to reach the Supreme Court, and after the Court announces its first certiorari order lists for the October 2000 Court term, the Committee should have a better sense of whether this aspect of the monitoring process requires further attention. If it does, the Committee will examine possible refinements of the monitoring process that now exist within the court.

REGIONAL SENSITIVITY AND OUTREACH

At the court meeting on December 15, 1999, the court authorized the continuation, for calendar year 2000, of the Regional Calendaring experiment for the Northern unit of the circuit. Pursuant to this experiment, at least one judge who resides in the Northern administrative unit is assigned to the three-judge panel hearing a case within that region. The Committee anticipates the effectiveness of

this project may be measured, at least in part, by how it is received in the Northern **r**egion of the circuit. Although we may all agree that the result in a given case does not depend upon whether a particular judge on the panel is from a particular region, we cannot deny that there is a perception that judges from particular regions bring to a panel a certain sensitivity to the concerns of people within that region. Indeed, this perception has been expressed by Senators from the Northwest and has been formalized by inclusion in Senator Feinstein's bill.

"Regional Sensitivity and Outreach" involves more than regional assignment of judges. It also involves having the court sit in cities where the court does not ordinarily sit and making continued efforts to interact informally with practitioners in those cities. To that end, such regional sittings have been combined with bench-bar activities and thereby have increased outreach to and communication with all parts of the circuit. During calendar year 1999, the court conducted oral arguments and bench-bar meetings in Anchorage (Alaska), Coeur d' Alene (Idaho), Missoula (Montana), San Diego (California), Phoenix (Arizona), and Honolulu (Hawaii). These regional sittings and bench-bar meetings were conducted in addition to the court's regular sittings in Pasadena, San Francisco, Portland, and Seattle. The Committee has recommended, and the Chief Judge has agreed, to continue and expand regional sittings and bench-bar meetings throughout calendar year 2000. Moreover, a pending amendment to the Circuit Rules would institutionalize these bench-bar gatherings as an ongoing responsibility of the Advisory Rules Committee.

COLLEGIALITY

There is a perception, reinforced by the White Commission Report, that larger courts have more difficulty than smaller courts in being "collegial." There is no empirical data to support such an assumption, and it is contrary to the input the Evaluation Committee received from the academic experts it consulted. The perception seems largely based on the assumption that the main way judges get to know one another's way of thinking is through court sittings. Thus, the staff director for the Commission, Professor Meador, recently testified: "The present Ninth Circuit limited en banc functions through judges who are unlikely to have worked together before in deciding cases and will never do so again . . . ."

The judges of the Ninth Circuit know from their own experience this is not correct. The assumption that there is a correlation between court size and collegiality ignores the existence of the telephone, e-mail, meeting for lunch and dinner while on calendar, and the constant press of issues that relate to administration of the court and how we do our work, not to mention the steady stream of communication on whether to take cases en banc. Our e-mail traffic covers such diverse topics as chambers space allocation, whether or not bench memoranda should be pooled, the successes of our children and grandchildren, and recommendations for legal reading.

The White Commission suggested, however, that as the size of a court increases,

> [t]he opportunities the court's judges have to sit together decrease. In a court of twenty-eight judges, given a typical sitting schedule such as that used in the Ninth Circuit Court of Appeals, it would be rare for a judge to sit with every

> other judge of the court more than once or twice in a three-year period.

Id. at 47.

Although the Commission's observation overlooks judges sitting with one another on motions and screening panels and the times judges sit together en banc, improvement could be made in the frequency with which judges sit with one another on regular three-judge panels. Improvement in this area might be achieved by reducing the use of visiting judges. This option might become viable once the court's judicial vacancies are filled. Improvement might also be achieved if judges were willing to forego preferences as to their off-calendar months. Another solution might be to mix judges on panels when two or more panels are sitting in the same city in the same week. The disadvantage of such mixing, of course, would be that the assignment of cases for opinion writing would become somewhat more complicated.

Another aspect of collegiality is "civility" among judges. Judge Wald of the D.C. Circuit has stated that collegiality in this form comes into play in opinions and dissents, and involves colleagues writing respectfully about the views of one another. Although this may be correct, breaches of this kind of civility are not peculiar to large circuits. An informal Committee survey of recent circuit court decisions containing dissents failed to reveal any correlation between size and "nastiness."

It is apparent that "collegiality" has many aspects and subparts. These will be considered by the court at its Symposium in May.

CONCLUSION

With regard to most of the matters the Committee has considered, its work seems to be drawing to an end. Other matters remain on the table.

Various aspects of collegiality will be discussed at the Symposium, and further work on that subject may or may not be indicated. The Feinstein bill, if enacted, would deal with en banc issues. To the extent these issues are not dealt with by that bill, the Committee expects to take a fresh look at its previous recommendations in light of the court's experience under the new en banc culture. With regard to Regional Calendaring, it would be useful for the Committee to evaluate the effectiveness of that project at the end of the year. The experiment with Consistency of Decisions is ongoing and will require some continuing oversight, evaluation, and eventual reporting.

The Committee has made substantial progress on all of these matters, and with additional information that will be available over the coming months, it is anticipated a final report will be made to the court after year's end.

Respectfully submitted,

The Evaluation Committee